Supreme Court, U.S.
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No. ——— OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1997

JENNELL L. BRANSON
Petitioner

v.

GREYHOUND LINES, INC. AMALGAMATED COUNCIL RETIREMENT AND DISABILITY PLAN
Respondent

On Petition for Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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62 pp

QUESTION PRESENTED FOR REVIEW

The administrator of an ERISA pension plan decides that a participant's rights in the plan will depend on the lawfulness of his seniority agreement with the employer, as determined by the NLRB. The NLRB decides in favor of the participant, who then files suit for a declaratory judgment that the plan must abide by the administrator's decision. The plan's lawyer then has the plan trustees come up with a new reason for ruling against the participant. The plan gives interpretive power to the trustees, but there is reason to believe they have a conflict of interest and are biased against the participant. Should the "arbitrary and capricious" standard apply under these circumstances?

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Fifth Circuit are listed in the caption.

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OPINIONS BELOW

The District Court made findings of fact and conclusions of law, reproduced in the Appendix, but which were unreported. The Court of Appeals affirmed. *Branson v. Greyhound Lines, Inc. Amalgamated Council Retirement and Disability Plan*, 126 F.2d 747 (5th Cir. 1997).

BASIS FOR JURISDICTION

The judgment sought to be reviewed was entered on October 30, 1997. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1132(a)(1)(B) of Title 29, United States Code, provides in pertinent part as follows:

"(a) **Persons empowered to bring civil action**

A civil action may be brought —

(1) by a participant or beneficiary —

* * *

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify

his rights to future benefits under the terms of the plan;"

STATEMENT OF THE CASE

The Circuit Court's summary of the evidence is generally correct, but incomplete in several key respects. Accordingly, other undisputed facts will be included, with appropriate references to the record.

Mr. Branson sued his employer, Greyhound Lines, Inc. ("Greyhound" or "GLI") and the pension plan which GLI runs with its union ("the Plan"). He accused GLI of breaching its agreement to give him seniority credit for 10.18 years of prior Greyhound service (followed by about a three-year break), and he sought a declaratory judgment that the Plan should also treat him as having that same seniority restored to him. He lost on both issues in the United States District Court for the Western District of Texas, but the Fifth Circuit reversed as to GLI and affirmed as to the Plan, applying the familiar "abuse of discretion" standard. *Branson v. Greyhound Lines, Inc.*, 126 F.3d 747, 756-758 (5th Cir. 1997). *See also* Appx., pp. 22a-23a. The contract claim against GLI is not before this Court, absent a certiorari application from it. However, many facts about the contract claim are relevant to the pension plan issues and will therefore be included in the summary.

Mr. Branson was a Greyhound bus driver from 1977 to 1987, had a break in service of about two years and eight months, and then returned to GLI during the bitter and violent strike of 1990. The National Labor Relations Board has graphically described Greyhound's negotiating strategy in *Greyhound Lines, Inc. and Amalgamated Council etc.*, 319 N.L.R.B. 554, 559-561 (1995).

In general, Greyhound was trying to break its union by making non-negotiable demands for certain clauses in the collective bargaining agreement then being negotiated. One clause, entitled "Active Duty Language," would have treated returning strikers as new employees, with no seniority, when they reapplied for reinstatement after the strike. 319 N.L.R.B. at 566-567. The other, known as "Experience Based Seniority" ("EBS"), gave drivers Greyhound seniority for all of their experience "as a Department of Transportation qualified over-the-road tractor-trailer operator, over-the-road charter bus operator, or intercity bus operator," *Id.*, p. 568, which benefitted the strike breakers almost exclusively, since most of them had been working elsewhere prior to the strike. Those two clauses would have effectively placed the strike breakers at the top of GLI's seniority heap, to the extreme detriment of the strikers. GLI's tactics caused the strike to turn ugly and violent, and at least one striker was killed. *Id.*, p. 561. Mr.

Branson was caught in the middle and very much still is, at least as far as his pension rights are concerned. Despite the clear distinction between EBS and Greyhound seniority, both GLI and the Plan have chosen to treat Mr. Branson as a beneficiary of the hated (and eventually banned) EBS ploy.

All the parties agreed and the District Court found that Mr. Branson had a vested interest in the Plan as a result of his 10.18 years of prior service. R., Vol. 1, p. 39. The issue was whether he could continue earning credits under the Plan for his service after returning to work in 1990. The difference is substantial: almost $1,100 per month for life. *Id.*, p. 47.

The clause in the Plan entitled "Break in Service" says that an individual who returns to work with more than 10 years of vesting service can resume accruing retirement credit in the Plan. However, another clause, entitled "Participation," says an employee cannot later resume active participation if he "terminates employment . . . and thereupon loses his seniority under the collective bargaining agreement . . .". *Cf.* §§ 2.1 and 2.4 of Plaintiff's Exhibit 17. The two clauses cannot be reconciled, unless they relate to different subjects.

When Mr. Branson first began trying to get the Plan to follow its break in service clause, Plan administrator Paul E. Owsley, a former president of the union, R., Vol. 5, pp. 71-72,

rebuffed him, on the grounds that Mr. Branson had been "re-hired and not reinstated." Then, Mr. Owsley and union assistant business agent Wes Ponsford changed their position, saying that Mr. Branson's status as a re-employed employee would be determined by the NLRB in its resolution of the EBS issue. Plaintiff's Exhibit 18 (part). However, when Mr. Branson raised the matter with GLI, it took the same position in the exact same language as that first used by Mr. Owsley: Mr. Branson could not take advantage of the break in service clause because he had been "re-hired and not reinstated." Plaintiff's Exhibit 10.

The NLRB ruled in Mr. Branson's favor, basically. It did hold that EBS was an unlawful superseniority program, inherently destructive of the right to strike, 319 N.L.R.B. at 571-575, but it painstakingly distinguished EBS from Greyhound seniority. *Id.*, at 570. The Board held that EBS was illegal, but Greyhound seniority was not EBS. Mr. Branson pointed this out in correspondence with both the union and the company. *See* Plaintiff's Exhibit 18. The Plan ignored him, and GLI informed him that it considered his Greyhound seniority to be the same as EBS. Mr. Branson filed suit first against the Plan and then against GLI after it kept refusing to recognize the difference between EBS and Greyhound seniority. *See* Plaintiff's Exhibit 4.

The Plan raised as a defense Branson's failure to exhaust his administrative remedies by appealing to the Plan trustees. The District Court abated the proceedings so that he could do so, which gave the Plan's attorney an opportunity to come up with a defense which would, hopefully, sound better than deferring to the NLRB.

The Plan did not receive any independent advice about the claim. Instead, its attorney of record in this case provided a memo recommending denial of Mr. Branson's claim because, upon his 1987 resignation, Mr. Branson had "thereupon" lost his seniority under the applicable CBA. The CBA in effect then set out various circumstances in which Greyhound was required to recognize former seniority during subsequent employment. The Plan's attorney proposed that the trustees apply the principle of *"expressio unius est exclusio alterius"* and interpret the CBA's requirement of prior seniority recognition in certain circumstances as a prohibition of such recognition in all other circumstances. Defendant's Exhibit Plan F. The trustees rubber stamped their attorney's recommendation without elaboration. Defendant's Exhibit Plan G.

The trustees consisted of three company representatives and three union representatives, including Mr. Dick Simpson, R., Vol. 5, p. 75, the president and business agent for the union,

who previously had refused Mr. Branson's request for union assistance in this very same matter. Plaintiff's Exhibit 18 (letter dated 9/14/93). The union appointees had obvious reason to resent Mr. Branson for helping GLI try to break the union. Greyhound showed its animus against Mr. Branson by trying to break its 1990 agreement with him and by threatening him with termination on the eve of trial if he did not accept its offer of settlement. R., Vol. 1, pp. 86-88; R., Vol. 5, pp. 6-7.

At any rate, the Plan now had a new justification for its denial of Mr. Branson's claim and a new defense to his suit. The distinction between being "re-hired" and "reinstated," drawn by Mr. Owsley and Greyhound, would not be mentioned again. Likewise, there would be no further mention of how Mr. Owsley and the union had told Mr. Branson that his rights under the pension plan depended upon resolution of the EBS issue by the NLRB.

REASONS FOR GRANTING THE WRIT

The deferential standard for judicial review of pension plan determinations, variously called "abuse of discretion" and "arbitrary and capricious," has effectively eliminated any meaningful judicial oversight in this critical area of our national economy. The time has come for this Court to clarify whether this is what it really meant to occur when it decided *Firestone*

Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1988). The extreme misfortune of Mr. Branson furnishes a good opportunity for such a salutary exercise of this Court's power.

Mr. Branson was unfortunate enough to find himself caught in the middle of something like a war between two exponents of big business and big labor who happened to control a big pension plan. He allowed Greyhound to use him in its shameless campaign of union busting, and it is fatuous to say that the union bore him no grudge. Eventually, GLI turned against him so completely that they threatened to terminate his employment if he did not settle with them the day before trial. There was certainly more than ample reason to believe that the pension plan trustees appointed by GLI and the union were "operating under a conflict of interest." *Firestone*, 489 U.S. at 115, 109 S.Ct. at 957.

Not surprisingly, the responses Mr. Branson got from Greyhound, the union, the Plan administrator, and the trustees all look suspiciously like a search for some excuse that would fit their predetermined conclusion to deny his claim. At various times they told him the problem was that he had been "re-hired and not reinstated," or that his rights would depend on the NLRB's predictable response to the pending no-brainer about

the legality of EBS, and finally that he lost because of a completely new maxim of construction: "requirement of certain things is prohibition of all others." This case thus represents an extreme, but probably not isolated, example of the extent to which the deferential standard has immunized pension plan decisions from judicial review.

Interestingly, this Court's seminal decision establishing the deferential standard in *Firestone* was dictum. The company in that case was trying to get this Court to hold that ERISA itself established the deferential standard without regard to plan language. *Firestone*, 489 U.S. at 111-113, 109 S.Ct. at 954-956. This Court held instead that ERISA mandates "a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 489 U.S. at 115, 109 S.Ct. at 956-957.

What happened next was thoroughly predictable. Every single ERISA plan in the country was changed to take advantage of this Court's dictum. Plans were even allowed to apply the changes and the deferential standard retroactively. *Diaz v. Seafarers Union*, 13 F.3d 454, 458 (1st Cir. 1994). A diligent search has turned up a grand total of one reported case in which a court has held the deferential standard to have been

met. *Henry v. Home Insurance Company*, 907 F.Supp. 1392 (C.D.Cal. 1995).

Such a state of the law, as a practical matter, amounts to considerably more than deference and something at least fairly close to absolute immunity. Courts do hold, from time to time, that various government agencies have behaved arbitrarily and capriciously, and courts of appeal similarly will find, on occasion, that trial judges have abused their discretion. ERISA pension plans' apparent one hundred percent litigation success rate under the deferential standard, however, is even more striking than experience with the "strict scrutiny" standard for racial classifications which had at least one conspicuous exception in *Korematsu v. United States*, 323 U.S. 215, 65 S.Ct. 193, 89 L.Ed.2d 194 (1944). Simply put, no decision — and certainly no dictum — of this Court has ever immunized so thoroughly an entire industry as *Firestone* apparently has.

Some courts of appeal, while never ruling against a pension plan, have picked up on this Court's dictum within dictum to the effect that conflict of interest is a factor in determining whether or not an abuse of discretion has occurred. At least two courts have amplified on that a bit by holding that even a legally correct interpretation of a plan may still constitute an abuse of discretion and be "arbitrary and capricious if it

advances the conflicting interests of the fiduciary at the expense of the affected beneficiary or beneficiaries unless the fiduciary justifies the interpretation on the grounds of its benefit to the class of all participants and beneficiaries." *Jones v. Sonat, Inc. Master Employee Benefits Plan*, 997 F.2d 113 (5th Cir. 1993), quoting *Brown v. Blue Cross & Blue Shield of Alabama, Inc.*, 898 F.2d 1556, 1566-1567 (11th Cir. 1990). In at least one case, the Fifth Circuit has suggested that a slightly different standard, something close to de novo review, might apply when there is a "suspicion of partiality" on the part of the plan trustees, in which case the court must resort to a "sliding scale" applying greater scrutiny to the trustees' decision as the suspicion of partiality increases. *Lowry v. Bankers Life & Casualty Retirement Plan*, 871 F.2d 522, 525 n. 6 (5th Cir. 1989).

Both the District Court and the Court of Appeals refused to consider applying anything other than the abuse of discretion standard, despite all of the circumstantial evidence of partiality, because of two occasions when the union assisted Mr. Branson with minor matters. 126 F.3d at 756-757; Appendix, pp. 24a, 38a-39a. Even if such weak evidence were enough to exonerate the union, there is nothing to dispel the obvious inference of Greyhound's bias from its attempts to breach its contract with Mr. Branson. Most significantly, not a single

member of the Plan's board of trustees testified at the trial so that their claims of impartiality toward Mr. Branson could be tested by cross examination.

CONCLUSION

It is respectfully submitted that, for the reasons outlined above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Jennell L. BRANSON, Plaintiff-Appellant,

v.

GREYHOUND LINES, INC. AMALGAMATED COUNCIL RETIREMENT AND DISABILITY PLAN; Greyhound Lines, Inc., Defendants-Appellees.

No. 96-50881

United States Court of Appeals,
Fifth Circuit.

Oct. 30, 1997.

Before JONES, EMILIO M. GARZA and PARKER, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Jennell L. Branson appeals from the district court's order dismissing his claims against Greyhound Lines, Inc. ("Greyhound" or "GLI") and Greyhound Lines, Inc. Amalgamated Council Retirement and Disability Plan (the "Plan"). The district court held as a matter of law that Branson's breach of contract claim against Greyhound was preempted by section 8 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158, and section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. We

reverse the district court's preemption ruling and remand for action consistent with this opinion.

The district court further ruled that the Plan Trustees did not abuse their discretion under the Employees' Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), by rejecting Branson's claim for additional seniority credit. We affirm.

I.

Branson began working for Greyhound in May 1977 and remained an employee of the company until July 1987, when he resigned to take another job. At the time of Branson's voluntary termination, he was covered by the 1987 collective bargaining agreement ("1987 CBA"), negotiated between Greyhound and the Amalgamated Transit Union (the "Union") . Branson's 10.18 years of service entitled him to certain vested, non-forfeitable pension rights under the Plan, which continues to exist as a legal entity separate and apart from Greyhound and the Union. Branson later returned to work for Greyhound as a replacement employee in April 1990, about a month into a bitter strike.

By the time Branson returned to work for Greyhound, the most recent collective bargaining agreement (the 1987

CBA) had expired, and negotiations toward a new collective bargaining agreement were proceeding. Greyhound also had recently introduced a new term in its negotiations with the Union, essentially designed to encourage experienced drivers to cross the picket line. Greyhound labeled this new term "Experience Based Seniority" or "EBS", and it promised Greyhound seniority credit for any past commercial driving experience. Greyhound informed the Union that it would not abandon this program under any circumstances and began implementing EBS without further negotiations. Shortly thereafter, the Union filed an unfair labor charge with the National Labor Relations Board ("NLRB" or "Board") based on the implementation of EBS.

Following Branson's return to work, he filled out a standard form by which he requested seniority credit not only for his prior work with Greyhound, but also for driving experience gained from other firms. Because Branson had worked only part-time for these other companies, however, Greyhound granted Branson credit only for his prior Greyhound service.

The grants of EBS "super-seniority" to replacement workers and returning strikers became a major issue in the continuing negotiations between Greyhound and the Union.

Even when Greyhound and the Union at last succeeded in signing a new collective bargaining agreement ("1993 CBA"), they inserted a provision leaving the resolution of EBS to the NLRB. The Board later found EBS to be an unfair labor practice and ordered Greyhound to "eliminate all effects of EBS by all appropriate means." Greyhound subsequently began an EBS "buy-out" program, whereby the Company offered cash payments to those employees that had earned EBS in exchange for their signing a standard waiver form.

Branson refused to sign the waiver, insisting that he wanted his additional seniority credit rather than the cash buy-out. Thereafter, Branson brought suit against the Plan in federal court, seeking declaratory relief setting forth his rights under the Plan as provided in ERISA, 29 U.S.C. § 1132(a)(1)(B). Because Branson had not submitted his claim to the Plan Trustees before filing suit, the trial court granted a joint request to modify the scheduling order to permit exhaustion. The district court held the cause in abeyance while Branson exhausted his administrative remedies. The Plan Trustees subsequently held that Branson could not accumulate additional seniority credit under the Plan beyond his already vested 10.18 years. In the meantime, Branson amended his complaint to include a breach of contract claim against Greyhound based on the alleged promise of seniority.

Branson then tried his case to the district court. At the close of Branson's presentation of evidence, the district court dismissed Branson's breach of contract claim against Greyhound on preemption grounds. The bench trial continued with respect to the Plan. Following the trial, the district court ruled in favor of the Plan, finding that the Trustees did not abuse their discretion in interpreting the Plan to deny Branson additional seniority credit after his termination in 1987. Branson's timely appeal followed.

II

[1] At the close of Branson's presentation of evidence, the district court granted judgment as a matter of law in favor of Greyhound on the grounds that both the NLRA and the LMRA preempted Branson's breach of contract claim. Branson timely appealed the district court's order on both grounds.[1] We review *de novo* the district court's rulings on preemption. *Baker v. Farmers Elec. Coop., Inc.*, 34 F.3d 274, 78 (5th Cir. 1994).

A

[2] In order to preserve the primary jurisdiction of

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[1] Because we reverse the district court's judgment as to the breach of contract claim against Greyhound, we do not address Branson's claim that the district court erred in granting judgment for Greyhound without adequate notice and without making findings of fact.

the NLRB, the NLRA requires that courts not regulate activities "when it is clear or may fairly be assumed that [such] activities . . . are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959); *accord Belknap , Inc. v. Hale*,, 463 U.S. 491, 498, 103 S.Ct. 3172, 3177, 77 L.Ed.2d 798 (1983); *Windfield v. Groen Div., Dover Corp.*, 890 F.2d 764, 767 (5th Cir. 1989). Here, Branson seeks to recover for Greyhound's alleged breach of a promise to restore Branson's previously acquired seniority.

The first prong of *Garmon* preemption requires us to decide whether Branson bases his claim on an activity "protected by section 7" of the NLRA. *Garmon*, 359 US. At 244, 79 S.Ct. At 779. Section 7 protects the rights of *employees* to organize, strike, and collectively bargain. 29 U.S.C. § 157. Branson's claim, however, relies on his *employer's* alleged breach of contract. Because the employer's alleged breach of contract does not constitute "activity protected by section 7," the first prong of *Garmon* protection does not apply.

[3] The second prong of *Garmon* preemption requires us to decide whether Branson's claim involves an

activity actually or arguably forbidden under section 8 of the NLRA, which prohibits employers from engaging in unfair labor practices. *Garmon*, 359 U.S. at 244, 79 S.Ct. At 779, 29 U.S.C. § 158. Branson argues that his claim arises solely under an individual promise, unrelated to GLI's implementation of EBS, and therefore involves no terms of employment arguably regulated by section 8. Whether Branson's seniority is or is not EBS, however, does not prove dispositive. Certainly if Branson's claims do not involve the EBS program, no colorable argument exists for NLRB jurisdiction. *See Belknap*, 463 U.S. at 512, 103 S.Ct. at 3184 (holding that federal law does not preempt replacement employees from suing in state court for an employer's breach of individual promises of permanent employment).

Yet our holding of no preemption remains the same even if Branson's claims do involve EBS. The Supreme Court said as much in *Belknap*, where individual replacement employees succeeded in maintaining their state breach of contract claims against a company which promised them permanent employment but then fired them to make room for returning strikers. 463 U.S. at 495-497, 103 S.Ct. At 3175-3177. There the Court explicitly rejected the employer's contention that the employees' breach of contract suit was preempted "because it related to . . . conduct that was part and

a parcel of an arguable unfair labor practice." *Id.* at 510, 103 S.Ct. at 3183. Recognizing that "whether the strike was an unfair labor practice strike and whether the offer to replacements was the kind of offer forbidden during such a dispute were matters for the Board," the Court nevertheless noted that in making those determinations, "the Board would be concerned with the impact on strikers not with whether the employer deceived replacements." *Id.* Thus, the state law causes of action were not preempted by the NLRA because they were "of no more than peripheral concern to the Board and the federal law . . .while [the state] surely [had] a substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm." *Id.* At 511, 103 S.Ct. at 3183.

GLI seeks to distinguish *Belknap* on the grounds that "*Belknap* did not involve a breach of contract based on a term of employment concerning a mandatory subject of bargaining (seniority) unilaterally implemented by an employer upon an impasse in bargaining negotiations." As an initial matter, we note that Greyhound has failed to demonstrate whether impasse in fact occurred before the implementation of EBS, a finding necessary to complete Greyhound's alleged distinction. More fundamentally, however, *Belknap* indeed did involve a term of employment (whether the position was permanent or

temporary) concerning a mandatory subject of bargaining (reinstatement of strikers) unilaterally implemented by an employer upon an impasse in bargaining negotiations. *See Belknap*, 463 U.S. at 493-496, 103 S.Ct. at 3174-3176.

GLI more correctly observes that *Belknap* did not involve either an NLRB unfair labor practice finding or a specific order issued by the NLRB because the parties settled their differences before such a decision could issue. Nevertheless, *Belknap* addressed that very argument by noting that even in the face of an explicit Board order directing an employer to violate contracts made with replacement workers, "the suit for damages for breach of contract could still be maintained without in any way prejudging the jurisdiction of the Board or the interest of the federal law in insuring the replacement of strikers." 463 U.S. at 512, 103 S.Ct. at 3184.

The Supreme Court faced a similar issue in *J. I. Case v. NLRB*, 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed 762 (1944). There the Court ordered an employer not to enforce individual employment contracts that forestalled collective bargaining or deterred self-organization. 321 U.S. at 341-42, 64 S.Ct. at 582. Nonetheless, the Court specifically preserved the right of the employees to seek damages for the breach of their individual agreements. *Id.*

GLI also makes much of *Bassette v. Stone*, 25 F.3d 757 (9th Cir. 1994), cited by the district court for the proposition that Branson may have been able to bring his claim under section 8 of the NLRA. *Bassette* does hold that in addition to "limiting employers in which terms they may implement after impasse, section 8 requires that employers honor those terms once they are implemented . . . the latter duty follow[ing] from the former." 25 F.3d at 761. In *Bassette*, however, the court confronted the claims of an employee represented under the expired collective bargaining agreement, who continued to work during negotiations over a new collective bargaining agreement and whose claim rested on a unilaterally implemented term validly implemented under section 8.

Whether or not we should accept *Bassette* generally is a question we leave for another day. At the very least, however, we decline to apply *Bassette* on the facts currently before us, where a replacement employee has challenged the breach of a promise arguably based on a unilaterally implemented term that the NLRB already has determined violates section 8. Applying *Bassette* in this way would create an unacceptable incoherence in the duties required by section 8. It cannot both be an unfair labor practice to refuse to honor an implemented term and then also an unfair labor practice to continue to honor that same term.

In addition, simply labeling a term of employment "unilaterally implemented" cannot transform replacement workers into participants in the collective bargaining process. *See Service Elec. Co.*, 281 N.L.R.B. 633, 641 (1986) (holding that employer has no duty to negotiate with the union regarding the terms and conditions of the replacements' employment); *Leveld Wholesale, Inc.*, 218 N.L.R.B. 1344, 1350 (holding that union's duty of fair representation does not interfere with its ability to insist during negotiations that an employer terminate replacements to make room for returning strikers). These replacement workers come to work when no collective bargaining agreement is in effect, and they work under conditions that have not been collectively bargained for their benefit. *See Service Elec.*, 281 N.L.R.B. 633; *Leveld*, 218 N.L.R.B. at 1350 ("Strike replacements can reasonably foresee that, if the union is successful, the strikers will return to work and the strike replacements will be out of a job."); *cf. Belknap*, 463 U.S. at 513-514, 103 S.Ct. at 3184-3185 (Blackmun, J., concurring) ("During settlement negotiations, the union can be counted on to demand reinstatement for returning strikers as a condition for any settlement.").

To assert that such replacement workers must bring their claims to the NLRB rather than to an appropriate court, seems to vest this federal administrative body with power over

disputes purely private and independent of an unfair labor practice or collective bargaining agreement. *See* 29 U.S.C. § 160 (giving Board jurisdiction only to prevent any person from engaging in any unfair labor practice); *see also National Licorice v. NLRB*, 309 U.S. 350, 366, 60 S.Ct. 569,578, 84 L.Ed. 799 ("the National Labor Relations Act contemplates no more than the protection of the public rights which it creates and defines"). Federal labor law may create in represented employees a certain expectation and interest that an employer will abide by terms properly and unilaterally implemented during negotiations over a collective bargaining agreement. *See Bassette*, 25 F.3d at 760. Nevertheless, the expectations of replacement employees, who trust that an employer will keep its promises, stem from the different and more traditional source of state contract law. *See Belknap*, 463 U.S. at 507, 103 S.Ct. at 3181 (holding that even if replacement employees are "represented" by the Union in some technical sense, and thus governed by whatever settlement the Union negotiates to end the strike, this cannot change the Court's holding in *J. I. Case* that such currently "represented" employees may sue for damages on their non-collective contracts); *see also Caterpillar Inc. v. Williams*, 482 U.S. 386, 396, 107 S.Ct. 2425, 2431-32, 96 L.Ed.2d 318 (1987) (finding that a state-law plaintiff may be covered by a collective bargaining agreement, but still may have independent contract rights arising under state law).

[4] The remainder of GLI's arguments for affirming the district court's findings of preemption relates to the possibility that a court might order GLI to behave in a manner contrary to the NLRB's decision. As *Belknap* makes clear, however, "it will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it." *Belknap*, 463 U.S. at 512 n. 13, 103 S.Ct. at 3184 n. 13 (quoting *National Licorice Co. v. NLRB*, 309 U.S. at 365, 60 S.Ct. at 577). GLI fails to recognize the flip side of this statement, that although no tribunal may order specific performance in the face of a contrary NLRB order, proper tribunals nonetheless may award damages for that very breach "without in any way prejudicing the jurisdiction of the Board or the interest of the federal law in insuring the replacement of strikers." *Belknap*, 463 U.S. at 512, 103 S.Ct. at 3184. *J. I. Case* makes a similar distinction, providing that its order for the employer to bargain collectively, despite the existence of non-expired individual contracts, is "without prejudice to the assertion of any legal rights the employee may have acquired under such contract or to any defenses there-to by the employer." 321 U.S. at 342, 64 S.Ct. at 582.

Because Branson's breach of contract claim is not based

on activity arguably protected or prohibited under the NLRA, it is not preempted under *Garmon*.

B

The district court also held that section 301 of the LMRA preempted Branson's breach of contract claim because a resolution of the relevant allegations would depend on the analysis of one or more collective bargaining agreements. Because Branson bases his breach of contract claim on either the 1990 EBS program unilaterally implemented by GLI or a separate individual promise made to Branson, we disagree.[2]

[5,6] The district court's ruling on preemption is a question of law which we review *de novo*. *Baker v. Farmers Elec. Coop., Inc.*, 34 F.3d 274, 278 (5th Cir. 1994). Section 301 preempts state causes of action that allege the violation of a collective bargaining agreement affecting interstate commerce. *Allis-Chalmers Corp.*, 471 U.S. at 210, 105 S.Ct. at 1911; *Eitmann v. New Orleans Public Serv., Inc.*, 730 F.2d 359, 361-

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[2] In earlier proceedings, Branson made an alternative argument that "if for some reason the 1990 agreement should prove to be invalid, then Mr. Branson would nevertheless be entitled to his seniority under the plain and unmistakable language of the [1993] collective bargaining agreement itself." Because Branson does not reassert this argument in his briefs on appeal, it is waived. *See Zuccarello v. Exxon Corp.*, 756 F.2d 402, 407-408 (5th Cir. 1985); FED. R. APP. P. 28.

62 (5th Cir. 1984). When the resolution of a state law claim substantially depends on the meaning of a collective bargaining agreement, courts must treat the claim as o ne made under section 301 or dismiss it as preempted by federal labor law. *Allis-Chalmers,* 471 U.S. at 220, 105 S.Ct. at 1916; *Thomas v. LTV Corp.,* 39 F.3d 611, 617 (5th Cir. 1994). Nonetheless, section 301 does not necessarily preempt every state law claim between the parties to a collective bargaining agreement, nor does it preempt claims only tangentially related to such an agreement. *Lingle v. Norge Div. of Magic Chef, Inc.,* 486 U.S. 309, 409-11, 108 S.Ct. 1877, 1883-85, 100 L.Ed.2d 410 (1988); *Allis-Chalmers,* 471 U.S. at 211-12, 105 S.Ct. at 1911-1912; *Thomas,* 39 F.3d at 617.

[7] In the instant case, GLI claims that resolution of Branson's breach of contract claim depends on the interpretation of the 1987 CBA. We disagree. Greyhound concedes that at the time Branson retired in 1987, he had accumulated 10.18 years of seniority under the 1987 CBA. Deciding whether or not GLI made a subsequent promise in 1990 to credit Branson with that amount of seniority, whether Branson relied on such a promise, and whether GLI breached such a promise will not require the interpretation of the 1987 CBA and thus cannot support a finding of preemption. *See Lingle,* 486 U.S. at 413, 108 S.Ct. at 1885 (holding that section

301 preempts "an application of state law . . . only if such application requires the interpretation of a collective bargaining agreement").

GLI also claims that a court would have to consider the 1993 CBA's seniority provision "to consider the merits of the parties' dispute as to the nature of Branson's seniority." The seniority provision of the 1993 CBA, however, contains no precise definition of EBS, nor does it clarify whether EBS contemplated the extension of seniority credit only for non Greyhound driving experience. Even if it did, what Greyhound and the Union say in 1993 (in the CBA) about what Greyhound and Branson agreed to in 1990 cannot alter the analysis of the 1990 agreement itself (unless one argues that the 1993 agreement supersedes the one made in 1990, an argument addressed and rejected below). Thus, if and when a court attempt to resolve the merits of the dispute over the nature of the seniority allegedly promised to Branson in 1990, interpreting the 1993 CBA will not prove necessary or useful.

GLI additionally claims that a court must consider the 1993 CBA's seniority provision "to consider GLI's defense that validity of its action is based on the NLRB's order." We disagree. While GLI indeed may attempt to use the NLRB order as a defense to the state contract claim, section 301 does

not provide for the preemption of claims that might involve the interpretation of an NLRB order. *See Belknap*, 463 U.S. at 512, 103 S.Ct. at 3184. Simply pointing out that the 1993 CBA anticipates the issuing of such an order cannot transform GLI's defense into one based on the 1993 CBA.[3] To the extent that such a defense would implicate the 1993 CBA at all, it would do so only tangentially and thus would not preempt the underlying state claim.[4] *See Allis-Chalmers*, 471 U.S. at 211, 105 S.Ct. at

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[3] The 1993 CBA anticipates an NLRB order because Greyhound and the Union explicitly agreed to leave the resolution of EBS to the NLRB and to abide by whatever decision the NLRB made.

[4] The Supreme Court faced, but refused to decide, a similar issue in *Caterpillar, Inc. v. Williams*, where former employees brought a breach of contract suit in state court against their former employer based on alleged individual employment contracts. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). The employer sought to remove the case to federal court, arguing that its intent to raise a collective bargaining agreement as a defense mandated preemption under section 301. *Id.* at 390, 107 S.Ct. at 2428. Because of the procedural posture of the case — whether or not removal of the state claims to federal court was appropriate — the Supreme Court expressly declined to rule on the merits of the preemption issue. 482 U.S. at 398 n. 13, 107 S.Ct. at 2433 n. 13. Nonetheless, the Court expressly held that section 301 does not so "completely preempt" a state law claim for breach of contract that simply raising a collective bargaining agreement as a defense would merit removal. *Id; see also Franchise Tax Bd. V. Construction Laborers Vacation Trust*, 463 U.S. 1, 24, 103 S.Ct. 2841, 2854, 77 L.Ed.2d 420 (1983) ("[I]f a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arise under' federal law."). The Court noted that even when an employer-defendant alleges that a subsequent collective

1911 ("not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301").

GLI also argues that section 301 preempts Branson's breach of contract claim because the alleged individual seniority agreement seeks to limit or condition the 1993 CBA. Yet each of the cases that Greyhound cites for this proposition concern individual agreements made in the context of currently binding collective bargaining agreements. *See Thomas*, 39 F.3d at 617-18; *Eitmann*, 730 F.2d at 363. In *Thomas*,, we held that an individual attendance probation agreement negotiated by the employee, his union, and the employer that set forth minimum attendance requirements for the year and modified the discharge procedures of the existing CBA, would be treated as a CBA for section 301 preemption purposes. *Thomas*, 39 F.3d at 614-17. In *Eitmann*, we found that where an employer's pre-employment promises conflicted with the collective bargaining agreement in effect at the date of hire, section 301 would preempt a state law claim based on the pre-employment promise. 730 F.2d at 360-63.

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bargaining agreement supersedes the individual agreement at issue, section 301 does not necessarily mandate preemption. 482 U.S. at 394-97, 107 S.Ct. at 2430-32.

Here, in contrast to the cases cited by Greyhound, at the time Branson allegedly struck his individual deal with Greyhound, the 1987 CBA had expired and the bargaining parties had yet to agree on the 1993 CBA. In fact, Branson was a replacement employee and had no interest in the CBAs. *See Service Elec.*, 281 N.L.R.B. at 641 (employers have no duty to bargain with a striking union about terms for replacement employees). Thus, because no collective bargaining agreement governed at the time Branson and Greyhound allegedly made their individual contract, we cannot find that Branson's individual claim seeks to limit or condition a collective bargaining agreement.

Whether or not the 1993 CBA supersedes the alleged individual agreement, even though made outside the context of a binding collective bargaining agreement, presents a different issue. GLI relies on *J. I. Case* for the proposition that collective bargaining agreements must supersede and thus preempt individual employment contracts. Yet while *J. I. Case* did state broadly that the "very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements by employees," *see* 321 U.S. at 338, 64 S.Ct. at 580, the Court also explicitly sought to preserve the rights of employees to seek damages based on these superseded individual contracts. *See* 321 U.S. at 342, 64 S.Ct. at 582.

[8] The Supreme Court has attempted to correct this type of erroneous interpretation before. In *Caterpillar*, the employer "argue[d] that when respondents returned to the collective-bargaining unit, their individual employment agreements were subsumed into, or eliminated by, the collective bargaining agreement." 482 U.S. at 395-96, 107 S.Ct. at 2431. With unmistakable clarity, the Court responded:

> Caterpillar is mistaken . . . *J. I. Case* does not stand for the proposition that all individual employment contracts are subsumed into, or eliminated by, the collective-bargaining agreement . . . Thus, individual employment contracts are not inevitably superseded by any subsequent collective agreement covering an individual employee, and claims based upon them may arise under state law.

482 U.S. at 396, 107 S.Ct. at 2431 (citations omitted). "Caterpillar's basic error," continued the Court, "is its failure to recognize that a plaintiff covered by a collective bargaining agreement is permitted to assert legal rights independent of that agreement, including state law contract rights, so long as the contract relied upon is not a collective bargaining agreement." *Id.* Whether Branson's claim for breach of contract arises out of a purely individual agreement, as he alleges or out of Greyhound's unilateral implementation of EBS, as GLI alleges, no one posits that his claim arises out of a contract that is itself

a collective bargaining agreement.[5] GLI's arguments of supersession thus cannot withstand appropriate scrutiny.

In its final plea for a finding of section 301 preemption, GLI notes that should Branson prevail on his breach of contract claim, a court could not determine Branson's damages without looking to the rates of pay included in the 1993 CBA, or the parameters of any proper injunction without looking to the seniority provisions of the 1995 modification. Assuming *arguendo* that this proposition is true, it hardly establishes that Branson's underlying claim "is substantially dependent upon" an analysis of the terms of a collective bargaining agreement. *Allis-Chalmers*, 471 U.S. at 211, 105 S.Ct. At 1916. Indeed, the Supreme Court rejected this very argument in *Lingle*, 486 U.S. at 413 n. 12, 108 S.Ct. at 1885 n. 12, holding that while collective bargaining agreements may contain information such as rates of pay, possibly helpful in determining the damages due

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[5] GLI does half-heartedly assert that the EBS provisions are the "functional equivalent" of a collective bargaining agreement for preemption purposes. We disagree. The 1990 contract terms were not a collectively bargained instrument, and were functionally distinct in many ways. *See Thomas*, 39 F.3d at 618 (defining collective bargaining as "bargaining by an organization or group of workmen on behalf of its members with the employer"). The terms were implemented three days after being presented to the union. Lastly, section 301 preempts claims that depend on a CBA, not its functional equivalent. *Allis-Chalmers*, 471 U.S. at 220, 105 S.Ct. At 1916.

to a worker prevailing in a state-law suit, and while "federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state-law claim, not otherwise preempted, would stand."

GLI has presented no persuasive authority for the proposition that section 301 preempts Branson's breach of contract claim.

III

Branson appeals the district court's decision in favor of the Plan on two grounds: first, Branson argues that the district court erred in using the abuse of discretion standard to review the Trustees' interpretation; and second, he argues that the Trustees' interpretation was nonetheless an abuse of discretion. We disagree on both counts.

[9] The district court applied an abuse of discretion standard because it found that the Plan conferred discretionary authority on the Trustees. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 957, 103 L.Ed.2d 80 (1989); *Chevron Chem. Co. V. Oil, Chem. and Atomic Workers Local Union 4-447*, 47 F.3d 139, 142 (5th Cir. 1995). Whether the district court employed the correct standard of review for analyzing the Trustees' interpretation of the Plan is a question

of law which we review *de novo*. *Chevron Chem.*, 47 F.3d at 142.

[10] The district court must apply an abuse of discretion standard only when the Plan itself confers discretionary authority on the Trustees to interpret the Plan. *See Firestone Tire*, 489 U.S. at 115, 109 S.Ct. at 956-57 (holding that "a denial of benefits . . . is to be reviewed under a *de novo* standard unless the benefit plan gives the administrative or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan"); *Chevron Chem.*, 47 F.3d at 142. In *Chevron Chem.*, we held that the district court correctly used the abuse of discretion standard where the pension plan conferred discretionary authority in the following manner: "[T]he administrator is empowered to 'make such rules, regulations, [and] *interpretations* . . . and [to] take such other action . . . as [he] may deem appropriate." 47 F.3d at 143 (emphasis and alterations in original)(quoting pension plan).

[11] In the case at hand, the Plan uses similar language to confer discretionary authority upon the Trustees. Section 6.2 of the Plan states that the Trustees have the power "[t]o decide any question arising in the administration, interpretation, and application of this Plan." Consequently, the district court correctly used the abuse of discretion standard to

review the decision of the Trustees.

Branson argues, however, that the Trustees here are subject to a "suspicion of partiality"[6] and that the district court should have used a sliding scale — something less than the abuse of discretion standard — to review the Trustees' decision. *See Lowry v. Bankers Life and Casualty Retirement Plan*, 871 F.2d 522, 525 & n. 6 (5th Cir. 1989)(suggesting the possibility of using a sliding scale to review trustees' decisions). We disagree.

[12,13] The district court found, as a matter of fact, that no animosity toward replacement workers influenced either Greyhound or the Union. We review the district Court's factual findings for clear error. *See Bellaire Gen. Hosp. V. Blue Cross Blue Shield*, 97 F.3d 822, 829 (5th Cir. 1996). Branson does not dispute that in 1990 the Union helped him correct Greyhound records to reflect his actual starting date and that later, the Union pursued Branson's grievance regarding a company decision to place him on sick leave for an extended period of time. Under these circumstances, we cannot say that

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[6] Branson claims that the Plan operates under a conflict of interest because the Plan is managed by a six-member Board of Trustees, half chosen by the Union and half by Greyhound, none of whom have an interest in helping former strike-breakers.

the district court committed clear error in finding no suspicions of partiality. Thus, the district court was correct in refusing to use a suspicion of partiality as a factor in determining whether the Trustees abused their discretion.

[14] Branson additionally claims that the district court erred in finding no abuse of discretion because: (1) the Trustees looked to the 1987 CBA instead of the 1993 CBA to determine whether Branson lost his seniority;[7] and (2) even the 1987 CBA did not explicitly state that Branson would lose his seniority when he quit. We review *de novo* the district court's ultimate legal conclusion that there was no abuse of discretion by the Trustees. *See Sweatman v. Commercial Union Ins. Co.*, 39 F.3d 594, 601 (5th Cir. 1994).

[15-17] A two-step inquiry governs whether the Trustees abused their discretion in refusing to give Branson the additional seniority he claimed. *Pickrom v. Belger Cartage Serv., Inc.*, 57 F.3d 468, 471 (5th Cir. 1995). First, we determine whether the Trustees gave the Plan a "legally correct"

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[7] Branson also appears to argue that the Trustees should have looked to the 1990 Agreement implemented unilaterally by Greyhound to determine whether he lost his seniority. This argument ignores the fact that under section 11.1 of the Plan, any action taken by Greyhound without the concurrence of the Union can have no effect on the Plan.

interpretation. *Id.* In deciding the first step — whether the Plan's interpretation was legally correct — we consider three factors: (1) whether the Trustees have given the pension plan a uniform construction; (2) whether the Trustees' interpretation is consistent with a fair reading of the Plan; and (3) whether different interpretations of the Plan will result in unanticipated costs. *Id.; Chevron Chem.*, 47 F.3d at 145.

In the instant case, the first factor proves insignificant because the Trustees have not previously interpreted the relevant provisions. Although not determinative, the third factor of unanticipated costs supports the Trustees. Indeed, the Trustees' interpretation seems designed to thwart the very unanticipated costs that Branson's interpretation inevitably would produce. Particularly with employees like Branson, who have accumulated long terms of seniority and then left the company, attempting to arrange actuarially for the possibility that these employees might reenter the Plan at any moment, demanding immediate recognition of substantial terms of seniority, certainly results in unanticipated costs.

The second factor, relating to whether or not the Trustees' engaged in a "fair reading of the Plan," forms the basis of Branson's argument that the Trustees' abused their discretion in interpreting the Plan to deny him additional seniority credit. We find, however, that the Trustees' interpretation is a fair

reading of the Plan.

> Section 2.1 of the Plan provides:
>
> Notwithstanding anything to the contrary in this Section 2.1(1), however, an Active Participant who subsequently terminates employment with an Employer and thereupon loses his seniority under the Collective Bargaining Agreement . . . shall thereafter cease to be an Active Participant regardless of whether such Participant is subsequently re-employed by an Employer or a Related Employer.

The Plan provides in 2.3(2) that only Active Participants may accrue pension credit or benefits under the Plan. In 1987, Branson was an "Active Participant who subsequently terminate[d] employment with an Employer." Thus, the question for the Trustees became whether Branson "thereupon los[t] his seniority under the Collective Bargaining Agreement." The Trustees found that Branson *did* lose his seniority under the 1987 CBA and thus "cease[d] to be an Active Participant" in the Plan, meaning that he could no longer accrue additional pension credit, regardless of his later re-employment.

Branson argues that using the 1987 CBA does not comport with a fair reading of the Plan because the definition of "Collective Bargaining Agreement" includes not only "[t]he current collective bargaining agreement between the Company and the Union," but also any "extensions thereof, or any successor agreements between the parties." This definition,

however, cannot alter the import of the phrase, "*thereupon* loses his seniority" in section 2.1 (emphasis added). Black's Law Dictionary defines "thereupon" as: "without delay or lapse of time." BLACK'S LAW DICTIONARY 1478 (6th ed. 1990). Webster's New Collegiate Dictionary similarly defines "thereupon" as "immediately after that." WEBSTER'S NEW COLLEGIATE DICTIONARY 1201 (1979). Thus, the Trustees did engaged in a fair reading of the Plan by looking to the collective bargaining agreement in effect "immediately after" Branson terminated his employment in 1987.

Branson also argues that the Trustees failed to make a fair reading of the Plan by interpreting the 1987 CBA to impliedly revoke seniority for employees who voluntarily quit. We disagree. Branson correctly notes that the 1987 CBA neither explicitly protects nor explicitly revokes the seniority of employees who voluntarily quit. The 1987 CBA does, however, explicitly retain seniority for several categories of employees, including employees entering the armed forces, employees receiving leaves of absence for less than 30 days, employees furloughed as part of a reduction in force (so long as they return to work when it becomes available), employees in the service of the union, and employees accepting supervisory positions (so long as they resume a position within the bargaining unit within 24 months). The Latin maxim *expressio unius exclusio alterius*

proves instructive. The Trustees found that the inclusion of specific circumstances in which an employee retained seniority meant that an employee did not retain seniority in other circumstances. Consequently, those employees who voluntarily quit "lost" their seniority, and the Plan could not allow any later accumulation of additional seniority. Branson has failed to show that this not a fair reading of the Plan.

Having found that the Trustees' interpretation of the Plan was legally correct, we need not proceed to the second step of our analysis. *Pickrom v. Belger Cartage Serv., Inc.*, 57 F.3d 468, 472-473 (5th Cir. 1995). The Trustees did not abuse their discretion in interpreting the Plan.

IV

[18] In summary, we hold that Branson's breach of contract claim against Greyhound is not preempted by the NLRA or the LMRA.[8] We reverse and remand to the district

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[8] We affirm the district court's denial of Branson's motion for summary judgment on his breach of contract claim against Greyhound. The record discloses several genuine issues of material fact, including the type, if any, of seniority credit Greyhound offered Branson, what that seniority credit would have done for Branson, whether or not Greyhound's subsequent behavior contradicted any accepted offer and whether Greyhound has any viable defenses.

court for proceedings consistent with this opinion.[9] We affirm the district court's judgment in favor of the Plan.

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[9] Branson's only remaining claim is a breach of contract based on state law. In light of this opinion, the district court may revisit its decision to exercise supplemental jurisdiction over Branson's state law claim. *See Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 585 (5th Cir. 1992) ("Our general rule is to dismiss state claims when the federal claims to which they are pendent are dismissed.").

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

JENNELL L. BRANSON,	§	
Plaintiff,	§	
	§	
v.	§	**EP-95-CA-235-DB**
	§	
GREYHOUND LINES, INC.– AMALGAMATED COUNCIL RETIREMENT AND DISABILITY PLAN and GREYHOUND LINES, INC.,	§	
Defendants.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On this day, the Court considered the above-captioned cause. Trial in this matter was before the Bench on Wednesday, September 25, 1996. The Plaintiff filed his Proposed Findings of Fact and Conclusions of Law on October 1, 1996. Defendant Greyhound Lines, Inc. Amalgamated Council Retirement and Disability Plan, also filed its Proposed Findings of Fact and Conclusions of Law on October 1, 1996. After due consideration, the Court is of the opinion that this matter be resolved as set forth below:

Dismissal of Plaintiff's Claims As Against Greyhound Lines, Inc.

At this point, the Court notes that, on the day of trial, after Plaintiff had presented all of his evidence, the Court dismissed Plaintiff's action as against Greyhound Lines, Inc., because state law causes of action are preempted by the National Labor Relations Act ("NLRA") when they concern an activity which is actually or arguably protected by the NLRA. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). In this instance, Plaintiff's action is based on conduct which is actually or arguably prohibited by Section 8 of the NLRA. *Bassette v. Stone Container Corp.*, 25 F.3d 757 (9th Cir. 1994). Finally, Section 301 of the Labor Management Relations Act preempts a state law claim, the resolution of which is dependent on the consideration or analysis of a collective bargaining agreement for resolution. *Allis-Chalmers Corp. v. Lueck*,, 471 U.S. 202, 220 (1985); *Thomas v. LTV Corp.*, 39 F.3d 611, 616 (5th Cir. 1994); *Baker v. Farmers Electric Cooperative, Inc.*, 34 F.3d 274 (5th Cir. 1994).

FINDINGS FACT

1. Plaintiff Jennell L. Branson went to work for Greyhound Lines, Inc. or one of its predecessors on or about May 16, 1977 as a bus driver. Plaintiff remained an employee of Greyhound Lines, Inc. ("the Company") until about July 20, 1987, when he resigned from the company to pursue other

employment opportunities. At the time of his resignation in 1987, Plaintiff had vested pension rights with the Greyhound Lines, Inc.- - Amalgamated Council Retirement and Disability Plan ("the Plan") based on his 10 years' service with the Company. Plaintiff returned to work for the Company as a bus driver on or about April 1, 1990.

2. Plaintiff filed this suit in the U.S. District Court for the Western District of Texas seeking declaratory relief setting forth his rights under the Plan, as provided in the Employee Income Retirement Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a)(1)(B). Plaintiff requests a declaration that he is entitled to pension credit for the time he has worked for the Company since his return in 1990. Defendant Plan duly answered, denying Plaintiff's right to such pension credit. Plaintiff has exhausted his remedies under the Plan. The Plan trustees considered and rejected Plaintiff's claim on or about February 6, 1996. This decision was then communicated in writing to Plaintiff and his counsel.

3. The Plan is managed by a six-member board of trustees. Half of the trustees are chosen by Greyhound Lines, Inc., and the other half are chosen by the Amalgamated Council of Greyhound Local Unions. The Plan was created in march 1987 and is a legal entity separate and apart from the Company and the Union.

4. Only those persons who were participating in one of

several predecessor retirement plans in 1987 could become participants in the Plan. As of January 1995, the Plan had about 17,074 participants. Of those, 1,466 are "active participants" who continue to accrue pension benefits under the Plan. About 10,754 of the participants are now receiving pension benefits. The remaining 4,854 participants, including Plaintiff, are classified as "inactive, non-retired participants," meaning they have vested pension benefits but are neither accruing additional benefits nor have begun receiving pension payments.

5. The Plan provides that a person who leaves the company and loses his seniority at that time ceases to be an active participant in the Plan even if he later returns to work for the Company. The Plan, at Sec. 2.1(1), states:

> Notwithstanding anything to the contrary in this Section 2.1(1), however, an Active Participant who subsequently terminates employment with an Employer and thereupon loses his seniority under the Collective Bargaining Agreement . . . shall thereafter cease to be an Active Participant regardless of whether such Participant is subsequently re-employed by an Employer or a Related Employer.

The Plan, at Sec. 2.3(2), provides that only Active Participants may accrue pension credit or benefits under the Plan. The Plan, at Sec. 6.2(b), provides that the trustees have the power "To decide any question arising in the administration, interpretation, and application of this Plan; . . ." The Plan may be amended

only by the joint action of the Union and the Company, as provided in Sec. 11.1.

6. At the time Plaintiff resigned from the Company in 1987, a collective bargaining agreement was in effect between the Company and the Amalgamated Council. Plaintiff was subject to the terms and conditions of the collective bargaining agreement. The collective bargaining agreement contains the following provisions regarding when covered employees may retain their seniority:

- Section A-17 (employees "in the service of the Union . . . retain and accumulate all seniority rights and benefits . . .");
- Section A-18 (bargaining unit employees accepting supervisory positions retain seniority for 24 months and "suffer no loss of seniority" if they resume a bargaining unit position during that period);
- Section A-24 (employees entering the armed forces "retain and accumulate seniority rights and benefits" during their military service);
- Section B-6 (by agreement, employees may receive leaves of absence of 30 days or more "without loss of seniority"); and
- Section B-7 (employees furloughed as part of a reduction in force "retain their seniority," although it may be lost if they decline to return to the company when work

becomes available).

The collective bargaining agreement, however, contains no language permitting a covered company employee who has resigned to pursue other employment interests to retain his seniority. Robert Tancos, a labor relations specialist with the Company, testified that the 1987-90 agreement had always been construed as divesting a driver of his seniority if he voluntarily quit the service of the Company. The current labor contract contains substantially the same provisions. Tancos further testified that in the thirty years he has been involved in labor relations for the Company, every labor agreement between the Company and the Union has been so construed with respect to the seniority of voluntary resignees. Likewise, Tancos testified that the labor agreements never provided for "bridging" of seniority for voluntary resignees. This position is also reflected in the documentary evidence submitted in this case.

7. In rejecting Plaintiff's contention that he should accrue pension benefits under the Plan for the time he has worked for the Company since 1990, the Trustees relied on Sec. 2.1(1) of the Plan.

8. Until Plaintiff's claim had been submitted, the Trustees had not been called upon to interpret the Plan language for purposes of determining if a person who voluntarily resigned from and later returned to employment with the Company should be permitted to accrue pension benefits based on the

latter period of employment.

9. Based on the pension benefits he accrued between 1977 and 1987, Plaintiff would be eligible to receive $134.99 per month for life if he retiree at age 55. Assuming Plaintiff works for the Company until he turns 55 years of age and were to receive pension credit not only for the time he worked from 1977 until 1987 but also for the time he would have worked after April 1990, Plaintiff would be eligible to receive $1,228.92 per month for life, if he retired at age 55. This calculation is based on the assumption Plaintiff would receive annual wage increases of 2 percent during that time, since pension payments are tied to a participant's average final earnings with the company.

10. The Trustees were advised that it would be inconsistent with the actuarial assumptions upon which the Plan's obligations have been calculated to allow a participant to accrue additional pension benefits once he had left the Company's employ, even if he should later return to work for the Company. Such an interpretation of the Plan language would have an adverse impact on contributions or benefits or both.

11. When Plaintiff returned to work in 1990, the labor contract had expired, and the union had called a strike. In an effort to induce non-union drivers to work during the strike, the Company promised them employment based seniority ("EBS").

This was seniority credit for any prior full-time employment they had as over-the-road drivers. When he returned to work in 1990, the Company credited Plaintiff with about 10 years' seniority. EBS was intended to enhance a driver's seniority for purposes of assignment of bus routes and, in turn, could affect his pay and vacations. The National Labor Relations Board subsequently found the Company's use of EBS to be illegal as an unfair labor practice. Thereafter, the Company and the Union agreed that all EBS would be rescinded. The Company then rescinded the 10 years' seniority it had credited to Plaintiff when he returned to work in 1990.

12. Plaintiff contends the Company promised him restoration of his Greyhound Seniority as such rather than EBS credit for that time. Tancos testified that the Company offered only EBS. As discussed below, neither EBS nor a unilateral promise of restored Greyhound seniority would affect Plaintiff's pension rights under the Plan.

13. There is no evidence to support the argument that the Union or the Company has been influenced by any purported animosity toward drivers, such as Plaintiff, who worked during the strike. After Plaintiff returned to work in 1990, the Union helped him correct Company records to reflect his actual starting date. Later, the Union pursued to Plaintiff's satisfaction his grievance regarding the Company decision to

place him on sick leave for an extended period of time. In January 1996, Plaintiff filed a grievance with the Union of the recision of his seniority. The Union did not pursue that grievance.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over Plaintiff's claim. See § 5029e) of ERISA, 29 U.S.C. § 1132(e). Plaintiff has exhausted his internal Plan remedies. His suit was timely filed, and the Plan, likewise, timely answered.

2. In § 6.2, the Plan furnishes the Trustees the authority to interpret and apply the plan language in their sound discretion. Therefore, this Court must accept any such interpretation unless it amounts to an abuse of that discretion. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989) (recognizing the abuse-of-discretion standard to be controlling, when the trustees are afforded such authority); *Chevron Chem. v. Workers Union 4-447*, 47 F.3d 139, 142-43 (5th Cir. 1995) (same and noting that language comparable to that in § 6.2 is sufficient to confer such authority). The Court must accord the Trustees' interpretation considerable deference. *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096, 1100 (5th Cir. 1990) (the courts must afford "great deference" to interpretations of plan language); *Wallace v. American Petrofina*, 668 F.Supp. 586, 591 (E.D.Tex. 1987)

(if the trustees of a pension fund and a participant offer rational, though conflicting interpretations, the trustees' interpretation must control).

3. The Trustees' interpretation of § 2.1 of the Plan is reasonable and conforms to the language of that section. The language provides that a participant who leaves the Company's employ and, thereby loses his seniority, ceases to be an active participant in the Plan, even if he later returns to work for the Company. This is the most natural reading of that section and the one the Trustees have given it. The interpretation does not conflict with other provisions of the Plan or with the Summary Plan Description. The SPD states:

> **What happens if I quit or am laid off and then I come back to work?**
>
> If your employment terminates and you lose seniority under the Collective Bargaining Agreement . . . then you cannot become an Active Participant in this Plan again, even if you come back to work. If you did not lose your seniority, you will become an Active Participant again when you return to work, as long as you . . . return as a Re-Employed Employee.

This question and answer directly addresses Plaintiff's circumstance and is consistent with the Trustees' position.

4. The Trustees also properly interpreted the Plan as stating that only "active participants" may accrue pension benefits. The Trustees properly read the collective bargaining

agreement in effect at the time Plaintiff voluntarily quit the Company in 1987 as divesting him of his seniority. The agreement contains numerous provisions detailing when seniority may be retained. None permits a voluntary resignee, such as Plaintiff, to retain seniority. Had the parties to the agreement intended such a result, they would have so stated.

5. The net effect of these provisions of the Plan and the relevant labor agreement is that a participant who leaves the Company and loses his seniority becomes ineligible to accrue additional benefits under the Plan even if the participant later returns to work for the Company. Plaintiff is such a participant and, accordingly, could not earn additional pension credit for the time he has worked for the company since 1990.

6. The Trustees' conclusion is reasonable in light of the language of the Plan and the collective bargaining agreement. There was no abuse of discretion. *See Chevron Chem.*, 47 F.3d at 145 (if trustees' position reflects a "reasonable reading" of the Plan, it generally should be upheld). This conclusion is further bolstered in that the Trustees have never rendered a contrary interpretation of the Plan *Id.* Similarly, a contrary interpretation of the Plan, as Plaintiff would give it, creates additional, unanticipated pension liability. This is a factor that may be considered, as well. *Id.* While the latter two considerations are not especially significant here, they are

consistent with the Trustees' decision in this case. *See Jordan v. Cameron Iron Works, Inc.*, 900 F.2d 53, 56 (5th Cir. 1990), *cert. denied*, 498 U.S. 939 (1990) (Absent any evidence concerning either prior interpretations of the plan language or unanticipated costs, the appellate court upholds summary judgment based on the trustees' "fair reading of the plan.").

7. Whether the Company offered Plaintiff EBS or actual Greyhound seniority in 1990 to induce him to return to work is irrelevant. In materials submitted to the Trustees, Plaintiff specifically disavowed any reliance on EBS. Furthermore, EBS was never intended to affect pension benefits. It has been declared illegal and it has been rescinded by mutual agreement of the Company and the Union. For these, among other reasons, EBS cannot and does not afford Plaintiff any right to pension credit for his employment with the Company since 1990. Assuming Plaintiff were, in fact, offered Greyhound seniority rather than EBS, this amounted to a unilateral action of the Company and cannot legally bind the Plan. The Plan itself provides it may be amended only by the joint action of the Union and the Company. In addition, ERISA will not give any legal effect to oral or written representations that "are not and, do not purport to be, formal amendments of a plan . . ." *Borst v. Chevron Corp.*, 36 f.3d 1308, 1322 (5th Cir. 1994), *cert. denied*, ____ U.S. ____, 115 S.Ct. 1699 (1995) (written

representations); *Rodriguez v. Western and Southern Life Ins. Co.*, 948 F.2d 969, 971 (5th Cir. 1991) (Fifth Circuit has rejected argument that an ERISA plan participant is entitled to additional benefits based on oral representations of his employer's representative); *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) (Court holds "that ERISA precludes oral modifications to benefit plan and that claims of promissory estoppel are not cognizable in suits seeking to enforce rights to pension benefits."). Whatever the Company's representations to Plaintiff may have been, they did not constitute amendments of the Plan entitling him to additional pension credit.

8. Finally, Plaintiff has offered no evidence that the Trustees labored under any sort of conflict in this case. There is no showing that the Union or the Company has targeted employees hired during the strike for disfavored treatment. In fact, the Union has taken action on Plaintiff's behalf on several occasions since his return in 1990. Moreover, the Plaintiff has offered no evidence the Trustees made their decision in this case based on any sort of improper grounds or because of any improper motives.

Accordingly, **IT IS HEREBY ORDERED, ADJUDGED** and **DECREED** that Plaintiff's claims against Defendant Greyhound Lines, Inc. are **DISMISSED.**

IT IS FURTHER ORDERED that judgment is

rendered on behalf of Defendant Greyhound Lines, Inc. - - Amalgamated Retirement and Disability Plan.

IT IS FURTHER ORDERED that Plaintiff shall take nothing, and Plaintiff's cause of action is hereby **DISMISSED**, with prejudice.

Finally, **IT IS ORDERED** that all taxable costs are hereby assessed against Plaintiff.

SIGNED this **30th** day of **October, 1996.**

/s/ David Briones
THE HONORABLE DAVID BRIONES
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
FEB 25 1998
CLERK

No. 97-1247

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1997

JENNELL L. BRANSON
Petitioner

v.

GREYHOUND LINES, INC. - AMALGAMATED COUNCIL RETIREMENT AND DISABILITY PLAN; and GREYHOUND LINES, INC.
Respondents

On Petition for Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

BRIEF OF GREYHOUND LINES, INC. - AMALGAMATED COUNCIL RETIREMENT AND DISABILITY PLAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

STATEMENT OF THE CASE[1]

This is a routine denial of benefits case, decided in conformity with the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, et seq. The controlling facts may be set forth relatively simply. Petitioner Jennell Branson worked for Greyhound Lines, Inc. (GLI) as a bus driver from May 1978 until he quit to take another job in July 1987. *Pet. App.* at 2a. Based on his 10 years' service, Petitioner has a vested right to a pension with Respondent Greyhound Lines Inc. — Amalgamated Council Retirement and Disability Plan (the Plan) when he reaches retirement age. This pension right has never been disputed. *Id.* Petitioner returned to work for GLI as a bus driver in April 1990, shortly after the unionized drivers went on strike. *Id.* Petitioner continued to work for GLI at least through the time of the district court trial on September 25, 1996. *Pet. App.* at 33a. Petitioner wishes to have this second period of employment used to enhance his pension benefits in contravention of the Plan language. The trustees denied Petitioner's request to count this latter time toward his pension. After a trial on the merits, the U.S. District Court for the Western District of Texas, in an unpublished opinion, found the trustees acted within their discretion and properly construed the governing provisions of the Plan in denying Petitioner's claim. *Pet. App.* at 41a. The U.S. Court of Appeals for the Fifth Circuit affirmed this ruling in a decision published at 126 F.3d 747. *Pet. App.* at 29a-30a.

Section 2.1(1) of the Plan provides that "an Active Participant who subsequently terminates employment . . . and thereupon loses his seniority under the Collective Bargaining Agreement . . . shall thereafter cease to be an Active Participant regardless of whether [he] is subsequently re-employed . . . ." *Pet.*

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[1]The Petition appears to have been timely filed, and this Court otherwise has jurisdiction to consider the petition pursuant to 28 U.S.C. § 1254(1).

App. at 27a; *Res. App.* at 1a.[2] Pursuant to the Plan, only "active participants" may earn pension credit. *Id.* Accordingly, if Petitioner lost his seniority with GLI when he voluntarily resigned in 1987, he ceased to be an active participant in the Plan at that time and could not earn *additional* pension benefits upon his return to work in 1990. The trustees reviewed the collective bargaining agreement in effect when Petitioner resigned and found it contained numerous specific instances in which employees might retain seniority, such as upon entering the military, going to work for the union, or being involuntarily furloughed for lack of work provided they return when work becomes available. The collective bargaining agreement has no such provision preserving the seniority rights of an employee who otherwise voluntarily resigns. The trial court made a similar finding of fact, *Pet. App.* at 35a-36a, and the court of appeals so noted, as well, *Pet. App.* at 28a.. From this, the trustees concluded that the absence of any language preserving seniority rights for voluntary resignees (such as Petitioner) means they lose their seniority upon termination. Both the district court and the court of appeals held this to be a reasonable interpretation. *Pet. App.* at 28a-29a, 41a.[3] A

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[2]The operative Plan language was set out in the Fifth Circuit's opinion. Respondent has included the pertinent sections of the Plan in its appendix to this brief in opposition. While Petitioner makes certain representations and arguments about the Plan language, he has omitted the text from his petition.

[3]As the Court of Appeals pointed out, this represents a fairly classic application of the doctrine of contract interpretation known as *expressio unius exclusio alterius* — the mention of one thing reflects the exclusion of like things not mentioned. *Pet. App.* at 28a-29a. This rule has been commonly applied to both collective bargaining agreements and ERISA-governed plans. *See, e.g., Barnes v. Independent Auto. Dealers of California*, 64 F.3d 1389, 1393 (9th Cir. 1995) ("Under the doctrine of *expressio unius est exclusio alterius*, we must assume that by expressly providing for subrogation in cases in which the Plan makes payment, the Plan document excludes subrogation when no payment is made."); *Browning Ferris*

contrary interpretation would lead to peculiar results. It would, among other things, place voluntary resignees in a better position than those employees involuntarily furloughed for lack of work. The former would retain seniority rights in perpetuity, while the latter would be divested of their seniority should they fail to return when work becomes available.

At trial, Robert Tancos, a labor relations specialist with GLI, testified that the 1987-90 collective bargaining agreement had always been construed as divesting a driver of seniority if he voluntarily resigned. The trial court made a finding of fact to this effect. *Pet. App.* at 36a. While the trustees did not have Tancos's testimony before them when they decided Petitioner's claim, it does underscore the correctness of their interpretation. Petitioner never presented any contrary evidence to the trustees or at trial. His primary rejoinder was a suggestion that some other labor agreement governs whether he lost his seniority when he quit in 1987. The court of appeals rejected this argument as patently inconsistent with the "thereupon loses his seniority" language of Sec. 2.1(1) of the Plan, which necessarily refers to the collective bargaining agreement in effect at the time of the employee's termination. *Pet. App.* at 27a-28a.

Based on the Plan language and the terms of the collective bargaining agreement incorporated by reference, the trustees determined that Petitioner could not count this second period of

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v. Union De Tronquistas, 29 F.3d 1, 2 (1st Cir. 1994) (collective bargaining agreement); *Cornell University v. UAW Local 2300*, 942 F.2d 138, 139 (2d Cir. 1991) ("[W]hen a Collective Bargaining Agreement enumerates those matters subject to arbitration, may it reasonably be inferred that those not enumerated are excluded . . . [?] We think the answer to the question is found generally in the Latin maxim *expressio unius est exclusio alterius*--specific inclusion of one thing is the exclusion of another."); *Ulmer v. Harsco Corp.*, 884 F.2d 98, 103-04 (3rd Cir. 1989) (Plan outlines specific circumstances in which severance benefits shall not be allowed; therefore, such benefits should be allowed in all other situations).

employment toward his pension, since he lost his seniority when he voluntarily resigned from GLI in 1987 and, thereby, ceased to be an active participant in the Plan. Again, Petitioner's pension based on his 10 years' service from 1977 to 1987 is fully vested and not at issue in this litigation.

Because Sec. 6.2(b) of the Plan affords the trustees discretionary authority, *see Pet. App.* at 23a-24a, 39a, both the district judge and the court of appeals reviewed this determination for any abuse of that discretion. They found none. Indeed, the trustees' conclusion represents the best reading of the controlling Plan language. The lower courts recognized as much. *Pet. App.* at 29a (court of appeals finds the trustees' interpretation to be "legally correct"); *id.* at 40a (district judge describes trustees' interpretation of Sec. 2.1 as reflecting the "most natural reading" of the language).

This effectively disposes of the legal dispute between Petitioner and the Plan. Because Petitioner mischaracterizes the record and asserts specious arguments based on those representations, it is necessary to set forth some additional facts.

The Plan is operated by a six-member board of trustees; the Amalgamated Council of Greyhound Unions and GLI each select three trustees. As a jointly-trusteed, Taft-Hartley fund, the Plan is a legal entity separate and apart from both the union and the company. *Pet. App.* at 33a. The Plan precludes modification of its terms by unilateral representations or actions of either GLI or the union. *Res. App.* at 3a (setting forth Sec. 11.1 of the Plan); *Pet. App.* at 25a n. 7 (court of appeals notes that in light of Sec. 11.1, "any action taken by Greyhound without the concurrence of the Union can have no effect on the Plan."). This simply conforms to well-settled ERISA law. *See, e.g., Borst v. Chevron Corp.*, 36 F.3d 1308, 1322 (5th Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995); *Rodrigue v. Western and Southern Life Ins. Co.*, 948 F.2d 969, 971 (5th Cir. 1991).

Petitioner contends that GLI representatives made certain promises to him in 1990 to induce him to return to work during the strike, including either restoration of his past Greyhound seniority or

crediting that time as "Employment Based Seniority." During the strike, GLI gave persons coming to work as bus drivers seniority credit for prior over-the-road driving experience. This was known in company parlance as EBS. Ultimately, the union challenged EBS as an unfair labor practice, and the National Labor Relations Board so held. *Greyhound Lines*, 319 NLRB 554, 571 (1995). EBS was thereafter formally rescinded. *Pet. App.* at 4a, 37a-38a. Petitioner suggests that the GLI representations somehow affected his pension rights. Whatever the company unilaterally promised Petitioner to get him to go to work during the strike cannot, as a matter of law, change his rights under the Plan. Both lower courts so ruled. *Pet. App.* at 25a & n. 7 (court of appeals finds that unilateral actions of GLI cannot bind the Plan); *id.* at 42a (trial court finds that whether GLI offered Petitioner EBS or restoration of his Greyhound seniority, neither would affect his pension rights under the Plan).

The procedural posture of the case is somewhat complicated in that Petitioner eventually joined independent claims against the Plan and GLI in the same action. Initially, Petitioner sued the Plan under ERISA for a declaration of his pension rights. In an amended complaint, Petitioner also asserted a state law breach of contract claim against GLI based on the promises supposedly made to him by the company representatives to induce him to return to work during the strike. *Pet. App.* at 4a. Unlike the ERISA claim against the Plan, this contract claim against GLI has never been considered on the merits. The trial judge found the contract claim to be preempted as a matter of federal labor law and did not reach the merits. *Pet. App.* at 32a. The Fifth Circuit held the claim was not preempted and, therefore, reversed and remanded for further proceedings. *Pet. App.* at 29a-30a & nn. 8, 9.

Further complicating the procedural history of the case was Petitioner's failure to exhaust his remedies under the Plan before filing suit. When Petitioner initially contacted the Plan about his pension rights, the plan manager informed him that no changes would be made because the entire issue of EBS remained in litigation. Petitioner did not appeal this determination to the trustees before bringing suit, thus violating both the exhaustion requirements

of the Plan itself and those imposed by ERISA. *Communications Workers Of America v. AT & T*, 40 F.3d 426, 431-32 (D.C. Cir. 1994) (canvassing cases and noting "well established" rule that plan participants seeking to establish rights pursuant to ERISA must exhaust internal remedies); *Denton v. First National Bank of Waco, Texas*, 765 F.2d 1295, 1303 (5th Cir. 1985) ("[C]ongress, in enacting ERISA, clearly wanted potential plaintiffs to first exhaust their administrative remedies before resorting to the federal courts."); *Amato v. Bernard*, 618 F.2d 559, 568 (9th Cir. 1980). After Petitioner brought suit, he and the Plan filed a joint motion with the trial judge requesting the case be held in abeyance to allow exhaustion of the internal remedies including review by the trustees. The trial court agreed. *Pet. App.* at 4a. As a result, the trustees had their first opportunity to review Petitioner's claim only after he filed suit. Because of Petitioner's own failure in this regard, what should have happened long before any judicial action began instead occurred during litigation.

Petitioner now argues that the trustees' decision is somehow suspect because it came while suit was pending and offered a fuller, more developed rationale than the plan manager's earlier response.[4] The timing of the trustees' review was a direct result of Petitioner's conduct. Thus, his suggestion that their decision simply amounted to an effort to manufacture a defense to this litigation is at best peevish and at worst little short of outrageous. While the trustees did not embrace the plan manager's precise reasoning, this is the whole point of requiring exhaustion of remedies in the first place. The trustees are charged with the fiduciary obligation to manage the Plan and its assets, and, accordingly, they must be given the opportunity to interpret the Plan. Moreover, it is their decision — not that of an underling — upon which the courts should pass. *See Communications Workers of America*, 40 F.3d at 432; *Amato*, 618

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[4]The net effect was the same. Neither the plan manager nor the trustees concluded Petitioner should receive additional pension credit.

F.2d at 567.[5]

Notwithstanding Petitioner's fuzzing of the record here, the trial judge and the court of appeals quite correctly held that the trustees properly construed the Plan language as precluding Petitioner's requested augmentation of pension benefits. Nothing about this case warrants further review.

ARGUMENTS IN OPPOSITION TO GRANTING WRIT

This case presents no issue worthy of review on *certiorari*, and this Court should devote no more time to it than is required to make that determination. Petitioner sought a declaration, pursuant to ERISA, regarding the time to be credited toward his pension. Following a trial on the merits, the district court held that the trustees had acted within their discretion in construing the Plan language. The Court of Appeals for the Fifth Circuit affirmed, finding that the trustees made a "legally correct" interpretation of the Plan and thus acted well within their discretion. *Branson v. Greyhound Lines, Inc.*, 126 F.3d 747, 758 (5th Cir. 1997); *Pet. App.* at 29a. In short, this is a garden-variety ERISA benefits case that was correctly resolved in conformity with well-settled legal principles governing such claims.

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[5]Petitioner further chides the trustees for seeking the advice of counsel in considering his appeal. Such consultation is hardly inappropriate. The trustees might well be faulted for deciding appeals without such input. In addition, Petitioner's counsel was given the opportunity to and did in fact provide the trustees with a position paper outlining his view on the question. *R. Vol. 5*, p. 74; *Plan Tr. Ex. E.*

1. The "abuse of discretion" standard outlined in this Court's *Firestone* decision sufficiently protects the interests of ERISA plan participants in avoiding improper denials of benefits, and, accordingly, this case fails to present an issue of sufficient importance to require review.

Review on *certiorari* and the concomitant investment of this Court's precious time and resources must be reserved for the truly exceptional case presenting an issue of such significance that it transcends the legal relationship of the parties and would, upon resolution here, recast the governing body of law. Generally, this sort of issue derives from a split among the circuit courts on a significant point of law or from a question of such great import that it will affect a broad spectrum of the citizenry. *N.L.R.B. v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951) ("Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.'") (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)). *See, e.g., Idaho v. Coeur d'Alene Tribe Of Idaho*, ___ U.S. ___, 117 S.Ct. 2028, 138 L.Ed.2d 438, 444 (1997) (certiorari granted to consider the "important . . . question" of an Eleventh Amendment bar to a suit brought by Tribe against Idaho over ownership interest in land under and around lake and related waterways); *Klehr v. A.O. Smith Corp.*, ___ U.S. ___, 117 S.Ct.1984, 138 L.Ed.2d 373, 380 (1997) (certiorari granted to resolve circuit split on application of statute of limitations in civil actions pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961-1968).

This case presents neither a disagreement among the circuits nor a profoundly important legal question. Petitioner does not even suggest the former as a ground for review here. Instead, he posits that this Court must reevaluate the "abuse of discretion" standard for judicial review of benefits decisions by plan trustees when they have been afforded such discretionary authority, as enunciated in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

Pet. at 9-10. According to Petitioner, this standard of review has amounted to a virtual immunization of plan trustees and their decision-making. Petitioner comes to this rather startling conclusion based on his legal research, which apparently "turned up a grand total of one reported case in which a court has held the deferential standard to have been met." *Id.* From this, Petitioner decries a legal crisis of epic proportion. This is nothing short of fatuous rhetoric. It is simply wrong from start to finish.

First, Petitioner's assertion about the frequency with which courts have found ERISA plan trustees to have abused their discretion in considering benefits claims since *Firestone* is hopelessly inaccurate. A rather cursory review by Respondent found some 17 cases decided in the last two years in which courts determined that plan trustees had abused their discretion in denying a claim for benefits. *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433, 443 (3rd Cir. 1997); *Shannon v. Jack Eckerd Corp.*, 113 F.3d 208, 210 (11th Cir. 1997) (court of appeals affirms district judge's decision to remand to plan for further review where its evaluation and denial were arbitrary and capricious); *Dewitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 521-22 (3rd Cir. 1997); *Spears v. Connors*, No. 95-6291 (6th Cir. Jan. 10, 1997), 1997 U.S. App. LEXIS 3609, *16; *Swaback v. American Information Technologies Corp.*, 103 F.3d 535, 541-42 (7th Cir. 1996); *Bellaire Gen. Hosp. v. Blue Cross Blue Shield*, 97 F.3d 822, 832 (5th Cir. 1996); *Canseco v. Construction Laborers Pension Trust*, 93 F.3d 600, 602 (9th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1250, 137 L.Ed.2d 331 (1997); *Saffle v. Sierra Pacific Power Co.*, 85 F.3d 455, 461 (9th Cir. 1996) (remand to plan upon finding administrator abused discretion in interpreting plan language); *Epright v. Environmental Resources Management*, 81 F.3d 335, 341-42 (3rd Cir. 1996); *Donaho v. FMC Corp.*, 74 F.3d 894, 901 (8th Cir. 1996); *Dial v. NFL Player Supplemental Disability Plan*, No. H-96-1338 (S.D. Tex. Oct. 28, 1997), 1997 U.S. Dist. LEXIS 17460, *23-24; *Monroe v. Pacific Telesis Group*, 971 F.Supp. 1310, 1316 (C.D. Cal. 1997); *Hussey v. E.I. DuPont De Nemours & Co. Pen. & Ben.*, 963 F.Supp. 576, 582 (S.D. W.Va. 1997); *Norman v. Holland*, 962 F.Supp. 843, 845 (S.D. W.Va. 1996), *aff'd mem.*, No. 96-2693 (4th Cir. Dec. 2, 1997); *Boggs v. Trustees of United Mine*

Workers Health, 960 F.Supp. 1015, 1021 (W.D. Va. 1996); *Crocco v. Xerox Corp.*, 956 F.Supp. 129, 144 (D. Conn. 1997) (remanded to plan for further review upon finding of improper denial of claim); *Cornett v. Trustees of United Mine Workers Health*, 950 F.Supp. 746, 747-48 (W.D. Va. 1996).[6]

As these cases reflect, the courts do provide the requisite review of ERISA-governed benefits plans necessary to prevent trustees from overstepping their discretionary authority in resolving participant claims. Far from immunizing trustees or other fiduciary decisionmakers, the *Firestone* standard strikes an appropriate balance between the cost and inefficiency created by repeated judicial intervention in plan operations and the need to protect against the arbitrary or otherwise abusive denial of benefits. *See Brogan v. Holland*, 105 F.3d 158, 164 (4th Cir. 1997); *Communications Workers of America*, 40 F.3d at 432 (noting that requiring claims to be submitted to trustees before suit has many salutary effects including "preventing premature judicial interference with a pension plan's decisionmaking process" and "enabl[ing] plan administrators to apply their expertise and exercise their discretion to manage the plan's funds, correct errors, [and] make considered interpretations of plan provisions . . . ."). *Cf. Challenger v. Local U. No. 1 of Intern. Bridge*, 619 F.2d 645, 649 (7th Cir. 1980) ("Congress intended fund trustees to have primary responsibility for claim processing . . . . To make every claim dispute into a federal case would undermine the

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[6]These cases are illustrative rather than exhaustive. Respondent did not attempt to canvass all of the ERISA benefits cases decided post-*Firestone*. Respondent conducted a computer-aided search of decisions rendered in the past two years and supplemented that with a brief review of recent decisions reported in a private research service devoted generally to ERISA related topics. Given the limited scope of this search, there undoubtedly are additional cases decided in the past two years in which plan trustees have been found to have abused their discretion in denying claims for benefits. Moreover, Respondent did not attempt to review and analyze cases more than about two years old.

claim procedure contemplated by the Act. It would also burden employee benefit funds with substantial expense.").[7]

In sum, the reality is far from the dire — indeed catastrophic — circumstance Petitioner portrays in his petition. Given this faulty factual premise, Petitioner's hyperbolic conclusion may be excused (and properly disregarded) as a product of misguided reasoning. In the end, however, Petitioner offers no sound reason why this Court should revisit *Firestone*. Consequently, there is no basis for granting his petition.

2. This case was correctly decided below, and review here would affect neither the underlying judgment nor the legal relationship of the parties.

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[7]The *Firestone* decision did not, as a practical matter, substantially change how courts review ERISA benefits claims for the most part. Prior to *Firestone*, many courts presumed ERISA itself mandated an "arbitrary and capricious" standard for judicial review of trustees' decisions on benefits claims. *Firestone*, 489 U.S. at 114 ("most federal courts had adopted the arbitrary and capricious standard of review"). In *Firestone*, this Court held that the scope of judicial review must be drawn from the plan language as filtered through trust law. Thus, if the plan affords the trustees discretionary authority, a court can reverse their determination only for an abuse of that discretion. Otherwise, courts are free to review such determinations on a *de novo* basis. *Id.* at 115. In short, *Firestone* anchored the source of the standard of review in the plan language rather than in ERISA and defined the standard as one of abuse of discretion rather than of arbitrary and capricious decisionmaking. The former holding simply led plans to include language spelling out the authority afforded fiduciaries. The latter effectively made little difference, since abuse-of-discretion review is essentially the same as arbitrary-and-capricious review. *See Canseco*, 93 F.3d at 605 (finding the two standards to be functionally equivalent); *Donaho*, 74 F.3d at 898 n. 5 (the two standards reflect "a distinction without a difference").

Apart from the artificial question of *Firestone's* efficacy in protecting plan participants, Petitioner suggests the trial court and the Fifth Circuit made certain case-specific errors that he claims warrant further review here. Even assuming such errors actually occurred, this Court does not grant *certiorari* to consider so limited questions. *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) (discretionary review in the Supreme Court "depends on numerous factors other than the perceived correctness of the judgment"); *Pittsburgh Steamship*, 340 U.S. at 503 ("This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way."). To do otherwise would transform this Court into little more than the court of appeals for the United States circuit. Moreover, however, the trial and appellate courts correctly decided the case on the facts and the law. No error infects the judgment against the Petitioner.[8] These contentions can be disposed of quickly:

●Petitioner contends GLI promised him restoration of Greyhound seniority rather than EBS when he returned to work in 1990, and, therefore, he must be allowed to accrue pension credit for this second period of employment. *Pet. App.* at 5. This is a non-issue as to the Plan. As the Fifth Circuit noted, whether GLI representatives promised Petitioner Greyhound seniority or EBS is a matter of dispute, but it is immaterial to the claim against the Plan. *Pet. App.* at 25a n. 7, 29a n. 8. The NLRB held EBS an unfair labor practice, and GLI then rescinded it. EBS cannot affect Petitioner's pension rights. To the extent Petitioner relies on a promise from the company of Greyhound seniority (assuming this actually reflects what was promised), it cannot affect his pension rights because it represents a unilateral action of GLI. Under the Plan language and

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[8]As Petitioner states the question presented for review, it represents precisely the sort of fact-bound issue inappropriate for review on *certiorari*. In addition, many of the factual assertions forming the basis of the question are themselves inaccurate, as discussed here.

settled ERISA principles, this sort of representation is legally ineffective to modify the Plan. *See* discussion, supra, at 4-5.

In making this argument, Petitioner also seriously misconstrues the NLRB decision. The Board and the Administrative Law Judge held EBS to be unlawful. *Greyhound Lines*, 319 NLRB at 554, 571. They made no findings about Petitioner in particular or the efficacy of any purported promises by GLI to restore past Greyhound seniority.[9]

●Petitioner suggests the Trustees acted inappropriately in reviewing his internal appeal while litigation was on-going. *Pet. App.* at 6-7. As discussed above, supra, at 5-7, this resulted from Petitioner's failure to timely exhaust his internal remedies. While the trustees' rationale differed from the plan manager's, it reflects a proper reading of the Plan language, as the lower courts found. There is nothing untoward about the trustees' actions. Had Petitioner's claim not been submitted to the trustees, the courts would have been unable to perform their duty. There could not very well be a review the trustees' decision for an abuse of discretion in the absence of a decision by the trustees. *Communication Workers of America*, 40 F.3d at 433 ("By permitting appellees' ERISA claim to proceed before obtaining a final decision from the Plan, the District Court left itself unable to apply properly the *Firestone* rule of deference.").

●Petitioner suggests the Trustees labored under a conflict because he was a strikebreaker, and, with resolution of the labor dispute, neither the union nor GLI had any particular incentive to

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[9]Contrary to Petitioner's assertion, the NLRB decision does not even deal with the *restoration* of past Greyhound seniority. It merely discusses the impact of EBS and in doing so compares the relative seniority of drivers awarded EBS when they came to work for the company during the strike with that of drivers having actual Greyhound seniority based on their continuous service with GLI. *Greyhound Lines*, 319 NLRB at 570-71.

help him. *Pet. App.* at 7. Petitioner's argument, however, is pure *ipse dixit*: Because Petitioner worked during the strike, the union necessarily bears him ill will, and, in turn, the union trustees rejected his appeal. According to Petitioner's theory, GLI, having made peace with the union, was content to go along. Petitioner offered no actual evidence to support this speculation. At trial, Petitioner did not testify that he or other strikebreakers had been the subjects of harassment or other disparate treatment at the hand of union adherents or company supervisors.[10] To the contrary, Petitioner admitted that the union had handled two grievances to his satisfaction, after the strike ended. *Pet. App.* at 24a-25a.

More to the point, the trustees' reading of the controlling Plan language represents not only a sound interpretation but the only reasonable one. Further, the trustees have never made a contrary interpretation of this language. *Pet. App.* at 26a.[11] These factors militate not only against a finding of abuse of discretion but also of any conflict. Had the trustees offered up an interpretation at odds with the plain meaning of the Plan language or which appeared inconsistent with prior interpretations of the same provision, a factfinder might be justified in concluding there had been an abuse of discretion (perhaps as a result of a conflict of interest), absent some extraordinary explanation for such a decision. *See, e.g., Wildbur v. ARCO Chemical Co.*, 974 F.2d 631, 638 (5th Cir. 1992), *clarified other grounds*, 979 F.2d 1013 (5th Cir. 1992) (an interpretation flying in the face of unambiguous plan language presents a "very strong indication" of an abuse of discretion). Such

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[10]Even if Petitioner had offered such evidence, it would not demonstrate that the trustees were motivated by such concerns in denying his pension claim. *See Sullivan v. LTV Aerospace and Defense Co.*, 82 F.3d 1251, 1255-56 (2d Cir. 1996) (participant must adduce evidence that the fiduciary "was in fact influenced by such conflict").

[11]This was the first time such an issue had come before the trustees.

tangible evidence stands in marked contrast to the bare surmise Petitioner offers. Were Petitioner able to prevail on this kind of speculation, it would effectively create an irrebutable presumption of a conflict on the part of the trustees of every jointly-trusteed ERISA plan following the resolution of a labor dispute between the company and the union appointing those trustees. This is not, nor should it be the law.

If plan trustees labor under an actual conflict, this may be taken into account when a court reviews their decision for abuse of discretion. *Firestone*, 489 U.S. at 115.[12] The existence of any conflict is a question of fact. *Sullivan v. LTV Aerospace and Defense Co.*, 82 F.3d 1251, 1257 (2d Cir. 1996); *Lowry v. Bankers Life and Cas. Retirement Plan*, 871 F.2d 522, 525 (5th Cir. 1989). *See also Duhon v. Texaco, Inc.*, 15 F.3d 1302, 1309 & n. 6 (5th Cir. 1994). Here, following a trial on the merits, the district judge found no conflict. *Pet. App.* at 38a-39a. The court of appeals specifically considered this determination and discerned no reason to disturb it. *Pet. App.* at 24a. This Court is not the forum for Petitioner to take a third shot at a question of fact.

●Petitioner suggests the Plan provisions are in conflict but fails to provide this Court with the actual language or any explanation of the purported inconsistency. *Pet.* at 4. Petitioner has misread the Plan. As discussed, supra, Sec. 2.1(1) of the Plan specifically governs Petitioner's situation, *i.e.*, he wants to count a second period of employment with GLI toward his pension. This section provides that a person who leaves the employ of GLI and loses his seniority is no longer eligible to earn further pension credit should he later return to work for the company. *See Res. App.* at 1a (setting forth text of Sec. 2.1(1)).

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[12]Contrary to the position Petitioner has taken previously in this case, proof of a conflict does not then require the court to apply a *de novo* standard of review. Rather, as noted in *Firestone*, the conflict bears on whether the trustees abused their discretion.

Petitioner contends this conflicts with Sec. 2.4 governing breaks in service. While Sec. 2.4 uses a number of specially defined terms, it essentially addresses the circumstances under which an employee who has returned to work for GLI will be given pension credit for his *earlier* period of employment with the company. *See Res. App.* at 2a (setting forth text of Sec. 2.4). It is this section that protects Petitioner's pension based on the 10 years he worked for GLI immediately before his resignation in 1987. This is clear from the last two sentences of Sec. 2.4, which explain when "pre-break" pension credit (called vesting and benefit service in the Plan) will be counted. Sec. 2.4 simply does not deal with how the subsequent period of employment will be treated for pension purposes. Secs. 2.1 and 2.4 address different issues and do not conflict with each other.

Petitioner's argument on this point is inextricably fact-bound, as well, since it turns on the specific plan language rather than any fundamental legal principles. Accordingly, it is not fodder for review on *certiorari*. It does illustrate, however, that the trustees reached not only a sound interpretation of the Plan but the only reasonable one. Whatever standard were used to judge their interpretation of the Plan and, in turn, their disposition of Petitioner's request, their decision was proper. This, in and of itself, strongly weighs against granting review in this case. Even if something other than an abuse-of-discretion standard were applied, it would make no difference in this case. The Plan language permits no reasoned conclusion other than the one the trustees reached.

CONCLUSION

For the reasons stated here, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Respondent Greyhound Lines, Inc. — Amalgamated Council Disability and Retirement Plan states that it is a trust organized as provided in 29 U.S.C. § 186(c) and, as such, is not a corporate entity and has neither parent nor subsidiary companies or corporations.

APPENDIX[1]

ARTICLE II—PARTICIPATION, SERVICE, AND CONTRIBUTIONS

SECTION 2.1--PARTICIPATION

1. **Active participation.** Each individual who was a participant in one of the Prior Plans on March 18, 1987, and became an Eligible Employee whose seniority accumulated with the predecessor Greyhound Lines, Inc., or The Greyhound Corporation Is recognized under the Collective Bargaining Agreement or a collective bargaining agreement between a union and an Employer or Related Employer and whose seniority is carried over to his employment with the Company or a Related Employer shall become an "Active Participant" (herein so-called) in this Plan on the date he commences employment with an Employer. Only an Active Participant shall be eligible to accrue a benefit hereunder for Benefit service performed for an Employer. Notwithstanding anything to the contrary in this Section 2.1(1), however, an Active Participant who subsequently terminates employment with an Employer and thereupon loses his seniority under the Collective Bargaining Agreement (or a collective bargaining agreement between a union and an Employer or a Related Employer) shall

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[1]This appendix contains relevant portions of the governing plan document of the Greyhound Lines, Inc. — Amalgamated Council Retirement and Disability Plan. The Plan, in its entirety, appears in the record at R. Vol. 2, pp. 222-280 and as Defendant Plan's Tr. Ex. B.

thereafter cease to be an Active Participant regardless of whether such Participant is subsequently re-employed by an Employer or a Related Employer.

SECTION 2.4--BREAK IN SERVICE

If, and to the extent that, an Employee's Vesting Service or Benefit Service prior to the Effective Date was disregarded under the Break in Service provisions of a Prior Plan as of March 18, 1987, such service shall continue to be disregarded under this Plan.

With respect to an Employee's Vesting Service and Benefit Service that was not so disregarded under the Break in Service provisions of a Prior Plan, and with respect to such service on or after the Effective Date, if the Employee incurs a Break in Service after the Effective Date, the Employee's rights and benefits under the Plan shall be determined in accordance with his accrued Vesting Service and Benefit Service at the time of the Break in service and in accordance with the following rules. For a Participant who is reemployed by the Employer as a Re-Employed Employee, his pre-break Vesting Service and Benefit Service shall be counted in determining his rights and benefits under the Plan. For a Participant who is reemployed by the Employer as other than a Re-Employed Employee, years of pre-break Vesting Service and Benefit Service shall not be counted in determining his rights and benefits under the Plan.

ARTICLE XI--AMENDMENTS AND EXECUTION

SECTION 11.1--AMENDMENTS

1. **General**. The Company, through its President, and the Union, through its duly recognized elected or appointed representatives, jointly reserve the right to amend this Plan, provided that no such amendment shall result in diverting any part of the Trust Fund to any purpose other than the exclusive benefit of Participants or their beneficiaries. In addition, the Board of Trustees shall make any amendments it determines are necessary, with or without retroactive effect, to comply with the provisions of ERISA and the Code and the regulations issued thereunder.